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21 *Plaintiff's and Defendant's Additional Counsel Listed On Next Page*

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28 **UNITED STATES DISTRICT COURT**
CENTRAL DISTRICT OF CALIFORNIA

19 LOS ANGELES WATERKEEPER, a
20 California non-profit corporation,

Case No. 2:17-cv-00822-RAO

21 Plaintiff,

[PROPOSED] CONSENT DECREE

22 vs.

23
24 **(Federal Water Pollution Control Act,**
25 **33 U.S.C. §§ 1251 *et seq.*)**

26 CITY OF BURBANK, a municipality,

27 Defendant.

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CONSENT DECREE

The following Consent Decree is entered into by and between Plaintiff Los Angeles Waterkeeper (“Plaintiff” or “Waterkeeper”) and Defendant City of Burbank (“Defendant” or “Burbank”). The entities entering into this Consent Decree are each an individual “Settling Party” and collectively the “Settling Parties.”

WHEREAS, Waterkeeper is a 501(c)(3) non-profit public benefit corporation organized under the laws of the State of California, with its main office in Santa Monica, California;

WHEREAS, Burbank is a California municipal corporation located in the eastern San Fernando Valley, nestled between the Hollywood Hills and the Verdugo Mountains, encompassing 17 square miles with a diverse population of approximately 103,000;

WHEREAS, Waterkeeper is dedicated to the preservation, protection, and defense of the inland and coastal surface and ground waters of Los Angeles County from all sources of pollution and degradation;

WHEREAS, Burbank operates two, adjacent electrical power facilities, individually called the Magnolia Power Project and the Burbank Water and Power Facility, and collectively called the BWP Campus, located at 164 West Magnolia Boulevard in Burbank, California, hereinafter referred to by the Settling Parties collectively as the “Facility”;

WHEREAS, Burbank is committed to complying with all environmental laws and regulations, while also recognizing the importance of conservation and environmental protection.

1 **WHEREAS**, Waterkeeper has approximately 3,000 members who live and/or
2 recreate in and around the Los Angeles area waterbodies receiving discharges from
3 the Facility, including the Los Angeles River, the Burbank Western Channel, San
4 Pedro Bay, and the Pacific Ocean;

5 **WHEREAS**, storm water discharges associated with industrial activity at the
6 Facility are regulated pursuant to the National Pollutant Discharge Elimination
7 System (“NPDES”) General Permit No. CAS000001 [State Water Resources Control
8 Board], Water Quality Order No. 92-12-DWQ (as amended by Water Quality Order
9 97-03-DWQ and as subsequently amended by Water Quality Order No. 2014-0057-
10 DWQ) (hereinafter the “Permit”), issued pursuant to Section 402 of the Federal Water
11 Pollution Control Act (“Clean Water Act” or “the Act”), 33 U.S.C. §§ 1251 *et seq.*;

12 **WHEREAS**, the Magnolia Power Project and the Burbank Water and Power
13 Facility located at the Facility are both registered under the Permit;

14 **WHEREAS**, the Facility’s subsurface storm water drainage system receives
15 storm water flows from offsite non-industrial sources through a shared storm water
16 conveyance system;

17 **WHEREAS**, the Permit includes the following requirements for all permittees,
18 including Burbank: 1) develop and implement a storm water pollution prevention plan
19 (“SWPPP”); 2) control pollutant discharges using best available technology
20 economically achievable (“BAT”) and best conventional pollutant control technology
21 (“BCT”) to prevent or reduce pollutants; 3) implement BAT and BCT through the
22 development and application of Best Management Practices (“BMPs”), which must be
23 included and updated in the SWPPP; and 4) when necessary, implement additional
24

1 BMPs to prevent or reduce any pollutants that are causing or contributing to any
2 exceedance of applicable water quality standards;

3 **WHEREAS**, on October 28, 2016, Waterkeeper served Burbank, the
4 Administrator of the United States Environmental Protection Agency (“EPA”), the
5 Executive Director of the State Water Resources Control Board (“State Board”), the
6 Executive Officer of the Los Angeles Regional Water Quality Control Board
7 (“Regional Board”), the U.S. Attorney General, and the Regional Administrator of the
8 EPA (Region 9) with a notice of intent to file suit under Sections 505(a)(1) and (f) of
9 the Clean Water Act, 33 U.S.C. § 1365(b)(1)(A) (“60-Day Notice letter”), alleging
10 violations of the Act and the Permit at the Facility;

11 **WHEREAS**, on February 1, 2017, Waterkeeper filed a complaint against
12 Burbank in the United States District Court, Central District Court of California,
13 entitled *Los Angeles Waterkeeper v. City of Burbank* (Case No. 2:17-cv-00822-RAO);
14 alleging violations of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), and
15 violations of the Permit at the Facility (“Complaint”) based on the 60-Day Notice
16 letter;

17 **WHEREAS**, Waterkeeper contends in its 60-Day Notice letter and Complaint
18 that, among other things, Burbank has repeatedly discharged polluted storm water in
19 violation of the Permit and the Clean Water Act;

20 **WHEREAS**, Burbank denies all allegations set forth in the 60-Day Notice
21 letter and Complaint relating to the Facility;

22 **WHEREAS**, the Settling Parties, through their authorized representatives and
23 without either adjudication of Waterkeeper’s claims or any admission by Burbank of
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1 any alleged violation or other wrongdoing, believe it is in their mutual interest and
2 choose to resolve in full Waterkeeper's allegations in the 60-Day Notice letter and
3 Complaint through settlement and avoid the cost and uncertainties of further
4 litigation;

5 **WHEREAS**, all actions taken by Defendant pursuant to this Consent Decree
6 shall be made in compliance with all applicable federal and state laws and local rules
7 and regulations;

8 **NOW THEREFORE IT IS HEREBY STIPULATED BETWEEN THE
9 SETTLING PARTIES, AND ORDERED AND DECREED BY THE COURT,
10 AS FOLLOWS:**

11 1. The Court has jurisdiction over the subject matter of this action pursuant
12 to Section 505(a)(1)(A) of the Clean Water Act, 33 U.S.C. § 1365(a)(1)(A);

13 2. Venue is appropriate in the Central District of California pursuant to
14 Section 505(c)(1) of the Clean Water Act, 33 U.S.C. § 1365(c)(1), because the Facility
15 at which the alleged violations took place is located within this District;

16 3. The Complaint states claims upon which relief may be granted pursuant
17 to Section 505(a)(1) of the Clean Water Act, 33 U.S.C. § 1365(a)(1);

18 4. Plaintiff has standing to bring this action;

19 5. The Court shall retain jurisdiction over this matter for purposes of
20 enforcing the terms of this Consent Decree for the life of the Consent Decree, or as
21 long thereafter as is necessary for the Court to resolve any motion to enforce this
22 Consent Decree.

1 **I. OBJECTIVES**

2 6. It is the express purpose of the Settling Parties entering into this Consent
3 Decree to further the objectives set forth in the Clean Water Act, 33 U.S.C. §§ 1251,
4 *et seq.*, and to resolve those issues alleged by Waterkeeper in its Complaint. In light
5 of these objectives and as set forth fully below, Defendant agrees to comply with the
6 provisions of this Consent Decree and to comply with the requirements of the Permit
7 and all applicable provisions of the Clean Water Act at the Facility.

8 **II. COMMITMENTS OF BURBANK**

9 7. In order to reduce or prevent pollutants associated with industrial activity
10 from discharging via storm water to the waters of the United States, Burbank shall
11 implement appropriate structural and non-structural BMPs, as described more fully
12 below.

13 8. **Maintenance of Implemented Storm Water Controls.** Burbank agrees
14 that the Facility shall maintain in good working order all storm water collection and
15 management systems currently installed or to be installed pursuant to this Consent
16 Decree, including but not limited to, existing housekeeping measures.

17 9. **Structural Improvements to Storm Water Management Measures.**

18 a. In order to prevent storm water from contacting some potential
19 pollutant sources at the Facility, within sixty (60) days of the Effective Date, Burbank
20 shall implement permanent awnings to the Magnolia Hydrogen Fill Station and the
21 MPP Hydrogen Storage Area at the Facility that are consistent with other permanent
22 awnings at the Facility. These locations are depicted on a map of the Facility attached
23 hereto as Exhibit A.

- 1 b. In order to filter storm water prior to discharge, within thirty (30)
2 days of the Effective Date, Burbank shall:
- 3 i. Enlarge the vault at sampling location 1 and install CleanWay
4 Catch Basin Filtration inserts with the MetalZorb filter;
- 5 ii. Install CleanWay MetalZorb filters at sampling locations 2 and
6 3;
- 7 c. Within fourteen (14) days of each of the improvements set forth in
8 Paragraph 9(a) and 9(b), Burbank shall e-mail Waterkeeper digital photographs
9 confirming said improvements.

10

11

12 **10. Storm Water Quality Improvement Feasibility Study.** On or before
13 June 1, 2018, Burbank shall obtain a draft Storm Water Quality Improvement
14 Feasibility Study (Feasibility Study) to analyze options to improve the quality of
15 storm water discharges from the Burbank campus to the Burbank Western Channel
16 and/or to eliminate/prevent storm water discharges. The Feasibility Study will review
17 the options for treatment of industrial pollutants (including, but not limited to, soluble
18 metals), various site treatment controls, source control and structural BMPs to
19 improve the quality of Burbank's storm water discharge and/or eliminate/prevent
20 storm water discharges. The Feasibility Study will include a technology assessment
21 and alternatives analysis, which will consider a range of criteria, including (a) run-on
22 characteristics, (b) diversion options, (c) site geometrics, (d) depth to groundwater, (e)
23 site geotechnical constraints, (e) capital and annual maintenance costs, (f)
24 constructability, (g) operations and maintenance considerations, and (h) CEQA
25 compliance and associated permitting requirements. The Feasibility will also prepare
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- 1 initial draft preliminary conceptual plans for the preferred alternative.
- 2 a. Within ten (10) business days of delivery of the draft Feasibility
- 3 Study to Burbank, Burbank shall provide a copy to Waterkeeper for
- 4 review and comment.
- 5 b. Waterkeeper shall provide comments, if any, to Burbank within
- 6 twenty (20) days. Burbank shall respond to Waterkeeper's comments
- 7 within twenty (20) days.
- 8 c. Within sixty (60) days of receiving Waterkeeper's comments,
- 9 Burbank staff shall recommend one of the options evaluated in the
- 10 Feasibility Study to the Burbank Water and Power General Manager
- 11 or the City Council for consideration, depending on the level of
- 12 approval required to proceed. Within ten (10) business days of
- 13 making this recommendation, Burbank shall inform Waterkeeper via
- 14 e-mail of staff's recommendation. The Parties acknowledge that a
- 15 Burbank staff recommendation does not constitute a commitment to
- 16 implement that alternative and that the selection of any alternative
- 17 identified in the Feasibility Study would be conditioned on prior
- 18 compliance with the California Environmental Quality Act (CEQA)
- 19 and any public review and hearing processes, and would be subject to
- 20 all other applicable governmental approvals.

25 **11. Storm Water Sampling and Monitoring**

- 26 a. Burbank shall collect and analyze storm water discharges from the
- 27 Facility from each of the four (4) sampling locations as depicted on Exhibit A from at

1 least four (4) qualified storm events (“QSE”) pursuant to the Storm Water Permit.¹
2 Burbank shall start this practice as of the Effective Date with respect to sample points
3 2, 3, and 4; provided, however, to the extent that Burbank has taken such samples
4 prior to the Effective Date, Burbank shall provide copies of such results as provided
5 for in sub-clause (f) below. Burbank shall start this practice as soon as the structural
6 improvement to sample point 1, described above in 9.b.i, is complete.

7
8 b. For internal sampling locations 1 – 3, as identified on Exhibit A,
9 Burbank shall collect storm water samples of water after it exits the filter that is
10 installed in each drain inlet.

11
12 c. For internal sample location 4, Burbank shall collect storm water
13 samples of water from the bottom of the pipe such that it represents the confluence of
14 all upstream drain inlets.

15
16 d. Burbank shall analyze all storm water samples collected at the
17 Facility for, at a minimum, the following parameters: pH, total suspended solids, oil &
18 grease, zinc, copper, and iron.

19
20 e. Burbank shall use a state certified laboratory to conduct all
21 analysis pursuant to this Consent Decree. Burbank shall select analytical test methods
22 from the list provided in Table 2 of the Permit.

23
24 f. Burbank shall provide Waterkeeper with the complete laboratory
25 results, including a copy of the Quality Assurance/Quality Control and the laboratory
26 report, for all storm water samples collected at the Facility sample locations 1-4 as
27

28¹ The “reporting year” runs from July 1 to June 30.
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1 depicted on Exhibit A at the same that Burbank posts results to SMARTS.

2 **12. Employee Training.** Within sixty (60) days of the Effective Date,
3 Burbank shall conduct employee training for employees/workers who have
4 responsibility for the implementation of any new storm water management
5 measures that are contained in this Consent Decree.

6 **13. Amendment of SWPPP.** Within thirty (30) days of the Effective Date,
7 Burbank shall amend the Facility's SWPPP to incorporate all changes, improvements,
8 and BMPs set forth in or resulting from this Consent Decree that have been
9 implemented. Burbank shall ensure that all maps, tables, and text comply with the
10 requirements of the Permit. Burbank shall revise the SWPPP to describe all structural
11 and non-structural BMPs, details of the measures to be installed, and discuss why
12 such BMPs should be effective in addressing the pollutant sources at the Facility. A
13 copy of the amended SWPPP shall be provided to Waterkeeper within ten (10)
14 business days of completion. Burbank shall ensure that the SWPPP indicates that
15 there will always be a member of the Pollutant Prevention Team or an operator trained
16 by the Pollutant Prevention Team at the Facility that can collect storm water
17 discharges when the Facility is operational.² Waterkeeper shall provide written
18 comments, if any, to Burbank within thirty (30) days of receipt of the amended
19 SWPPP. Burbank shall incorporate Waterkeeper's comments into the SWPPP or shall
20 justify in writing why any comment is not incorporated within thirty (30) calendar
21 days of receiving Waterkeeper's comments.

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² The Facility operates twenty-four (24) hours a day, seven (7) days a week.
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1 **14. Additional and Ongoing Revisions to SWPPP.** Burbank shall revise
2 the SWPPP, including the Monitoring Implementation Plan (“MIP”), pursuant to the
3 Storm Water Permit, including if there are any changes in Burbank’s Facility’s
4 operations that may possibly affect the quality of storm water discharges, including
5 but not limited to changes to storm water discharge point(s)/sample location(s) or
6 changes or additions to the BMPs resulting from an Action Plan, or the reduction of
7 discharge points. A copy of the amended SWPPP shall be provided to Waterkeeper
8 within ten (10) business days of completion. Waterkeeper shall provide written
9 comments, if any, to Burbank within thirty (30) days of receipt of the amended
10 SWPPP. Burbank shall incorporate Waterkeeper’s comments into the SWPPP or shall
11 justify in writing why any comment is not incorporated within thirty (30) calendar
12 days of receiving Waterkeeper’s comments.
13

14 **15. Reports.** During the term of this Consent Decree, Burbank shall provide
15 Waterkeeper with notice of all documents submitted to the Regional Board or State
16 Board via the State Board’s Storm Water Multiple Application and Report Tracking
17 System (“SMARTS”), by providing notice to Waterkeeper via e-mail that said
18 documents have been uploaded to SMARTS within seven (7) business days of
19 uploading said results. If a document (e.g., an e-mail) is submitted to the Regional
20 Board and/or State Board concerning storm water quality at the Facility but it is not
21 uploaded to SMARTS, a copy of such document shall be provided to Waterkeeper via
22 e-mail within five (5) business days of submission to said agency. Burbank need not
23 provide documents related to administrative compliance with the Permit or technical
24 assistance related to using SMARTS.
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1 **16. Annual Site Inspections.** Up to three Waterkeeper representatives or
2 consultants (including an attorney), may conduct one inspection (“Site Inspection”) at
3 the Facility each year that this Consent Decree is in effect. Site Inspections shall
4 occur between 8:00 a.m. and 5:00 p.m., Monday through Friday (excluding holidays),
5 and Waterkeeper shall provide Defendant with as much notice as possible, but at least
6 five (5) business days’ written notice prior to a Site Inspection and two (2) business
7 days’ notice prior to a Site Inspection during wet weather. Burbank reserves the right
8 to deny access to the Facility due to safety, security, and/or maintenance activities in
9 its sole discretion. Each Waterkeeper representative must pass a security screening
10 prior to admission to the Facility. Waterkeeper will provide any information required
11 by Burbank to perform a security clearance review in a timely fashion. To facilitate
12 this process, Waterkeeper may provide this information and obtain security clearance
13 at any point during the term of this Consent Decree Burbank retains sole discretion
14 whether to admit a Waterkeeper representative. Notice will be provided in accordance
15 with Paragraph 45. During the Site Inspection, Burbank shall allow Waterkeeper
16 and/or its representatives access to the Facility’s SWPPP, MIP, storm water
17 monitoring records, and non-privileged reports and data related to storm water
18 monitoring at the Facility. If the inspection occurs during a QSE, Waterkeeper may
19 request that Burbank collect a sample of storm water discharge from the Facility’s
20 designated sampling locations referenced in its SWPPP. Burbank shall collect the
21 sample and provide a split sample to Waterkeeper. Waterkeeper’s representative(s)
22 may observe the split sample being collected by Burbank’s representative.
23 Waterkeeper shall be permitted to take photographs during any Site Inspection

1 pursuant to this paragraph, consistent with Burbank's security procedures. If
2 Waterkeeper takes photographs, Waterkeeper shall provide Burbank with the
3 photographs within fourteen (14) calendar days after the Site Inspection. Waterkeeper
4 agrees that all individuals who will participate in a Site Inspection will execute the
5 waiver and release provided by Burbank prior to the Site Inspection.

7 **17. Early Termination.** If Burbank meets the requirements for Discharges
8 claiming "No Discharge" through the Notice of Non-Applicability ("NONA") and
9 files a Notice of Termination ("NOT") under the Permit prior to the termination of
10 this Consent Decree, Burbank shall provide Waterkeeper with a copy of the NONA
11 and NOT, concurrent with their submittal to the Regional Board. Within ten (10)
12 business days of the Regional Board's approval of the NOT, Burbank shall provide
13 written notification to Waterkeeper of the approval and remit all outstanding
14 payments under the Consent Decree related to the Facility to Waterkeeper, if any.
15 Within ten (10) business days of Waterkeeper's receipt of such notification, the
16 Consent Decree will terminate as to the Facility.

17 **III. MEET AND CONFER ABOUT SAMPLING RESULTS**

18 **18. Action Plan Regarding Exceedance of Numeric Limits.**

19 a. If the Facility's storm water sampling conducted in accordance
20 with Paragraphs 11.b and 11.c, above, during the term of this Consent Decree show
21 two or more exceedances of the numeric limit in Table 1 for a particular parameter at
22 either the sample point 4 or the average results from sample points 1-3 in a single
23 reporting year, then Burbank agrees to take responsive actions to improve its storm
24 water management practices, including re-evaluating its structural and non-structural
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1 BMPs and implementing additional BMPs aimed at reducing levels observed in storm
2 water samples.

3 **Table 1. Numeric Limits.**

4	Contaminant	Numeric Limit
5	Total Suspended Solids	100 mg/L
6	pH	6.0-9.0 s.u.
7	Oil and Grease	15 mg/L
8	Iron	1.0 mg/L
9	Zinc	0.120 mg/L³
10	Copper	0.013 mg/L

- 13 b. In furtherance of that objective, Burbank shall prepare a written
14 statement (“Action Plan”) that includes the following:
15
- 16 i. A discussion of any exceedance or exceedances of the numeric
17 limitations;

18 _____

19 ³ Several of the Numeric Limits drawn from the California Toxics Rule are hardness
20 dependent (shown in **bold**). The California Toxics Rule-based limits assume hardness
21 of 100 mg/l CaCO₃, however, Burbank may adjust the limit using the methods
22 provided in Appendix J of the 2008 EPA Multi-Sector General Permit based on
23 receiving water sampling hardness data. Burbank shall take a wet weather sample
24 from the Burbank Western Channel downstream of Burbank’s point of discharge
25 twice per storm water year to establish the hardness value for that year. Burbank shall
26 sample for hardness once during the first half of the storm water year (July –
27 December) and again during the second half of the storm water year (January – June).
28 Burbank shall use the hardness value from the first half of the storm water year for all
samples taken between July and December, and the second hardness value for
samples taken between January and June. As required by Appendix J of the 2008
EPA Multi-Sector General Permit, hardness will be sampled and analyzed using
approved methods as described in 40 C.F.R. Part 136.

- 1 ii. An explanation of the possible cause(s) and/or source(s) of any
2 exceedance; and
3
4 iii. Identification of responsive BMPs that will be taken to improve
5 the Facility's storm water management practices to further
6 reduce the possibility of future exceedance(s). Such BMPs that
7 Burbank shall implement, must include, at least one of the
8 following: additional or replacement storm drain filter inserts,
9 downspout filters for roof drains, infiltration of all or some
10 portion of storm water discharges from the Facility, retention of
11 storm water discharges from the Facility, active storm water
12 treatment of all or some portion of storm water discharges from
13 the Facility, or another comparable advanced BMP. To the
14 extent that one of the previous BMPs has been implemented
15 subsequent to a reporting year and there are exceedances of the
16 numeric limits in Table 1 during the following reporting year,
17 then Burbank shall be required to identify, at a minimum
18 another of the aforementioned BMPs in its subsequent Action
19 Plan and propose a plan for implementation. Burbank shall
20 retain sole discretion as to how to achieve Table 1 numeric
21 action levels in storm water samples at the Facility, so long as
22 the Action Plan is reasonably targeted to reduce the pollutant(s)
23 at issue to further reduce the possibility of future exceedance(s)
24 of the Table 1 numeric limits.

- iv. No Action Plan shall be required during the 2017-2018 storm water year if Burbank decides to implement an alternative from the Feasibility Study described in Paragraph 10.
- c. Should an Action Plan be required, such Action Plan shall be e-mailed or sent via first class mail to Waterkeeper not later than July 30th during each year that this Consent Decree is in effect, unless an Action Plan is triggered less than ninety (90) days from July 30, in which case the Action Plan shall be due ninety (90) days from the point where the Action Plan requirement was triggered. Burbank shall also be entitled to request an extension of time to prepare the Action Plan, which Waterkeeper shall not unreasonably refuse.
- d. In the Action Plan, Burbank shall provide a time schedule to implement any new BMPs. Burbank shall exercise reasonable diligence to implement any new BMPs pursuant to an Action Plan by the November 1 subsequent to the due date of each respective Action Plan. Burbank shall exercise diligence in planning, permitting, and implementing any new BMPs.
- e. No Action Plan shall be required for an exceedance of a Table 1 numeric limit if Burbank is in the process of implementing a previously submitted Action Plan.
- f. The Parties acknowledge that the State Board is currently considering amendments to the Permit that may define Permit compliance options through on-site and off-site storm water capture that are not currently

1 set forth in the Permit. To the extent that the State Board amends the
2 Permit during the term of this Consent Decree, the Parties agree to
3 meet-and-confer to determine if on-site and/or off-site storm water
4 capture compliance options added to the Permit may be utilized to
5 demonstrate compliance with Paragraph 18 of this Consent Decree.
6

7 **19. Action Plan Review.** Upon receipt of the Action Plan, Waterkeeper
8 shall have thirty (30) days to provide Burbank with written comments. Within thirty
9 (30) days of receipt of Waterkeeper's Action Plan comments, Burbank shall revise its
10 Action Plan to reflect the changes and /or additional BMPs as set forth in the Action
11 Plan or shall justify in writing why any comment is not incorporated. If requested by
12 Waterkeeper within thirty (30) days of receipt of such Action Plan, Waterkeeper and
13 Burbank shall meet and confer to discuss the contents of the Action Plan and the
14 adequacy of proposed BMPs to improve the quality of the Facility's storm water to
15 levels at or below the numeric limits. If requested by Waterkeeper within thirty (30)
16 days of receipt of such Action Plan, Waterkeeper and Burbank shall meet and confer
17 and conduct a site inspection within sixty (60) days after the due date of the Action
18 Plan to discuss the contents of the Action Plan and the adequacy of proposed
19 measures to improve the quality of the Facility's storm water to levels at or below the
20 numeric limits. This site visit shall count against Waterkeeper's allotted site visit per
21 year pursuant to Paragraph 16.
22

23 **20. Any concurrence or failure to object by Waterkeeper with regard to the**
24 **reasonableness of any additional measures required by this Consent Decree or**
25 **implemented by Burbank shall not be deemed to be an admission of the adequacy of**

1 such measures should they fail to bring the Facility's storm water discharges into
2 compliance with applicable water quality criteria or the BAT/BCT requirements set
3 forth in the Permit.
4

5 **IV. MITIGATION, FEES AND COSTS, AND OVERSIGHT**

6 21. **Mitigation Payment(s).** In recognition of the good faith efforts by
7 Burbank to comply with all aspects of the Permit and the Clean Water Act at the
8 Facility, and in lieu of payment by Burbank of any penalties, which may have been
9 assessed in this action if it had been adjudicated adverse to Burbank, the Parties agree
10 that Burbank will pay the sum of forty thousand dollars (\$40,000.00) to the Trust for
11 Public Land for the sole purpose of providing funding to green infrastructure projects
12 in the Los Angeles River watershed (see, e.g.,

13 <https://www.tpl.org/node/79108#sm.0000kmuaib1baocrfpws6jrl29zql>) (the
14 “Mitigation Payment”). Payment shall be mailed via certified mail or overnight
15 delivery to: Trust for Public Land, Attn: Tori Kjer, 135 West Green Street, 2nd Floor,
16 Pasadena, CA 91105. Payment shall be made by Burbank to the Trust for Public
17 Land within thirty (30) calendar days of the Effective Date. Burbank shall copy
18 Waterkeeper with any correspondence and a copy of the check sent to the Trust for
19 Public Land. The Trust for Public Land shall provide notice to the Parties within
20 thirty (30) days of when the funds are utilized by the Trust for Public Land, setting
21 forth the recipient and purpose of the funds.
22

23 If, pursuant to the Feasibility Study described above in Paragraph 10, Burbank
24 selects any alternative that does not retain, treat, or infiltrate, or a combination of the
25 above, storm water discharges from the Facility for equal to or greater than a 90th
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1 percentile storm event, then Burbank shall pay an additional sum (the “Supplemental
2 Mitigation Payment”) to the Trust for Public Land (in the manner as specified above)
3 as follows:

- 4
- 5 a. Thirty thousand dollars (\$30,000.00) if Burbank selects any alternative
6 that retains, treats, or infiltrates, or a combination of the above, storm
7 water discharges from the Facility for equal to or greater than a 85th
8 percentile, 24 hour storm event but less than a 90th percentile, 24 hour
9 storm event; or
 - 10 b. Sixty thousand dollars (\$60,000.00) if Burbank selects any alternative
11 that does not retain, treat, or infiltrate, or a combination of the above,
12 storm water discharges from the Facility for equal to or greater than a
13 85th percentile, 24 hour storm event.

14

15 Any alternative selected shall comply with the Design Storm Standards for
16 Treatment Control BMPs, as defined by Section X.H.6 of the Permit, and shall be
17 sized to accommodate the intended storm event size of the selected alternative (i.e.,
18 85th percentile, 90th percentile, etc.).

19

20 Burbank’s obligations under this Paragraph 21 shall not terminate until it makes
21 the Mitigation Payment and either (1) provides notice to Waterkeeper of
22 commencement of construction of the selected alternative, or (2) pays the
23 Supplemental Mitigation Payment to the Trust for Public Lands in the manner
24 described above.

25

26 **22. Reimbursement of Fees and Costs.** Burbank shall reimburse
27 Waterkeeper in the amount of Eighty-five thousand dollars (\$85,000.00) to help

1 defray Waterkeeper's reasonable investigation, expert, and attorneys' fees and costs,
2 and all other reasonable costs incurred as a result of investigating the activities at the
3 Facility related to this Consent Decree, bringing these matters to Burbank's attention,
4 and negotiating a resolution of this action in the public interest. Burbank shall tender
5 said payment, payable to "Los Angeles Waterkeeper", within thirty (30) days of the
6 Effective Date.

7 **23. Compliance Monitoring Funds.** As reimbursement for Waterkeeper's
8 future fees and costs that will be incurred in order for Waterkeeper to monitor
9 Burbank's compliance with this Consent Decree and to effectively meet and confer
10 and evaluate storm water monitoring results for the Facility, Burbank agrees to pay
11 Waterkeeper the amount of twenty thousand dollars (\$20,000) for its costs to be
12 incurred in overseeing the implementation of this Consent Decree. Burbank shall
13 make payment to Waterkeeper within thirty (30) calendar days of the Effective Date.
14 Payment by Burbank to Waterkeeper shall be made in the form of a single check
15 payable to "Los Angeles Waterkeeper."

16 **24. Stipulated Payment for Missed Deadlines.** Burbank shall make a
17 stipulated payment of Six Hundred Dollars (\$600.00) for each missed deadline
18 (defined as the due date plus three (3) business days) included in this Consent Decree,
19 not excused by Force Majeure. Payments for a missed deadline shall be used for the
20 sole purpose of providing funding to green infrastructure projects in the Los Angeles
21 River watershed. The Stipulated Payment shall be paid to the Trust for Public Land,
22 and mailed via certified mail or overnight delivery to: Trust for Public Land, Attn:
23 Tori Kjer, 135 West Green Street, 2nd Floor, Pasadena, CA 91105. Burbank shall
24

1 provide Waterkeeper with a copy of such payment at the time it is made. Burbank
2 shall make the Stipulated Payment within thirty (30) days of a missed deadline, unless
3 Waterkeeper agreed in writing to an extension of that deadline. Burbank shall provide
4 Waterkeeper with a copy of such payment at the time it is made.
5

6 **V. COMMITMENTS OF WATERKEEPER**

7 **25. Submission of Consent Decree to DOJ.** Within three (3) business days
8 of receiving all of the Parties' signatures to this Consent Decree, Waterkeeper shall
9 submit this Consent Decree to the U.S. Department of Justice ("DOJ") and EPA for
10 agency review consistent with 40 C.F.R. §135.5. The agency review period expires
11 forty-five (45) calendar days after receipt by the DOJ, evidenced by correspondence
12 from DOJ establishing the review period. In the event DOJ comments negatively on
13 the provisions of this Consent Decree, the Parties agree to meet and confer to attempt
14 to resolve the issues raised by DOJ.
15

16 **VI. WAIVER, RELEASES AND COVENANTS NOT TO SUE**

17 **26. Releases.** In consideration of the above, and except as otherwise
18 provided by this Consent Decree, the Parties hereby forever and fully release each
19 other and their respective parents, affiliates, subsidiaries, divisions, insurers,
20 successors, assigns, and current and former employees, attorneys, officers, directors
21 and agents from any and all claims and demands of any kind, nature, or description
22 whatsoever, and from any and all liabilities, damages, injuries, actions or causes of
23 action, either at law or in equity, which the Parties have against each other arising
24 from Waterkeeper's allegations and claims as set forth in the 60-Day Notice Letter
25 and Complaint for storm water pollution discharges at the Facility up to and including
26
27
28

1 the Termination Date of this Consent Decree.

2 27. **Waiver.** The Parties acknowledge that they are familiar with section
3 1542 of the California Civil Code, which provides:
4

5 A general release does not extend to claims which the creditor does not
6 know or suspect to exist in his or her favor at the time of executing the
7 release, which if known by him or her must have materially affected his
or her settlement with the debtor.

8 The Parties hereby waive and relinquish any rights or benefits they may have under
9 California Civil Code section 1542 with respect to any other claims against each other
10 arising from, or related to, the allegations and claims as set forth in the 60-Day Notice
11 Letter and Complaint and allegations and claims that could have been brought under
12 Section 505(a) of the Act, 33 U.S.C. § 1365(a) for storm water pollution discharges at
13 the Facility, up to and including the Termination Date of this Consent Decree.
14

15 28. **No Admission.** The Parties enter into this Consent Decree for the
16 purpose of avoiding prolonged and costly litigation. Nothing in this Consent Decree
17 shall be construed as, and Burbank expressly does not intend to imply, any admission
18 as to any fact, finding, issue of law, or violation of law, nor shall compliance with this
19 Consent Decree constitute or be construed as an admission by Burbank of any fact,
20 finding, conclusion, issue of law, or violation of law. However, this Paragraph shall
21 not diminish or otherwise affect the obligation, responsibilities, and duties of the
22 Parties under this Consent Decree.
23

25 **VII. BREACH OF CONSENT DECREE AND DISPUTE RESOLUTION**
26 **PROCEDURES**

27 29. **Dispute Resolution.** If a dispute under this Consent Decree arises, or
28

1 either Party believes that a breach of this Consent Decree has occurred, the Parties
2 shall schedule a meet and confer within ten (10) business days of receiving written
3 notification from the other Party of a request for a meeting to determine whether a
4 violation of this Consent Decree has occurred and to develop a mutually agreed upon
5 plan, including implementation dates, to resolve the dispute. In the event that such
6 disputes cannot be resolved through this meet and confer process, the Parties agree to
7 request a settlement meeting before the Magistrate Judge assigned to this action. The
8 Parties agree to file any waivers necessary for the Magistrate Judge to preside over
9 any settlement conference pursuant to this Paragraph. In the event that the Parties
10 cannot resolve the dispute by the conclusion of the settlement meeting with the
11 Magistrate Judge, the Parties agree to submit the dispute via motion to the District
12 Court. In resolving any dispute arising from this Consent Decree, the Court shall have
13 discretion to award attorneys' fees and costs to either party. The relevant provisions
14 of the then-applicable Clean Water Act and Rule 11 of the Federal Rules of Civil
15 Procedure shall govern the allocation of fees and costs in connection with the
16 resolution of any disputes before the Court. The Court shall award relief limited to
17 compliance orders and awards of attorneys' fees and costs, subject to proof.
18

20 30. **Force Majeure.** Burbank will notify Waterkeeper if timely
21 implementation of Burbank's respective duties under this Consent Decree becomes
22 impossible due to circumstances beyond the control of Burbank or its agents, and
23 which could not have been reasonably foreseen and prevented by Burbank's exercise
24 of due diligence. Any delays due to Burbank's failure to make timely and bona fide
25 applications and to exercise diligent efforts to comply with the terms in this Consent
26

1 Decree will not, in any event, be considered to be circumstances beyond Burbank's
2 control.

3 a. If Burbank claims impossibility, it will notify Waterkeeper in
4 writing within twenty (20) days of the date that Burbank discovers the event or
5 circumstance that caused or would cause non-performance with the terms of this
6 Consent Decree, or the date Burbank should have known of the event or circumstance
7 by the exercise of due diligence. The notice must describe the reason for the non-
8 performance and specifically refer to this section of this Consent Decree. The notice
9 must describe the anticipated length of time the non-performance may persist, the
10 cause or causes of the non-performance, the measures taken or to be taken by Burbank
11 to prevent or minimize the non-performance, the schedule by which the measures will
12 be implemented, and the anticipated date of compliance. Burbank will adopt all
13 reasonable measures to avoid and minimize such non-performance.

14 b. The Settling Parties will meet and confer in good faith concerning
15 the non-performance and, if the Settling Parties concur that performance was or is
16 impossible, despite the timely good faith efforts of Burbank, due to circumstances
17 beyond the control of Burbank that could not have been reasonably foreseen and
18 prevented by the exercise of due diligence by Burbank, new performance deadlines
19 will be established.

20 c. If Waterkeeper disagrees with Burbank's notice, or in the event
21 that the Settling Parties cannot timely agree on the terms of new performance
22 deadlines or requirements, either Settling Party may invoke the dispute resolution
23 process described in Paragraph 29 of this Consent Decree. In such proceeding,

1 Burbank will bear the burden of proving that any delay in performance of any
2 requirement of this Consent Decree was caused or will be caused by force majeure
3 and the extent of any delay attributable to such circumstances.
4

5 31. If circumstances outside of Burbank or its agents' control result in
6 changes to the Burbank's budget that delay implementation of Burbank's duties
7 pursuant to Paragraphs 9, 10, and 18 of this Consent Decree, the Term of the Consent
8 Decree shall extend day-for-day until the completion of such delayed duties.
9

10 **VIII. MISCELLANEOUS PROVISIONS**

11 32. **Effective Date.** The Effective Date of this Consent Decree shall be upon
12 the subsequent entry of the Consent Decree by the Court.

13 33. **Term of Consent Decree.** Subject to Paragraphs 21, 30, and 31, above,
14 this Consent Decree shall terminate on June 30, 2020 or through the conclusion of
15 any proceeding to enforce this Consent Decree initiated prior to June 30, 2020, or
16 until the completion of any payment or affirmative duty required by this Consent
17 Decree, whichever is the later occurrence.
18

19 34. **Execution in Counterparts.** The Consent Decree may be executed in
20 one or more counterparts which, taken together, shall be deemed to constitute one
21 and the same document.
22

23 35. **Facsimile Signatures.** The Parties' signatures to this Consent Decree
24 transmitted by facsimile or electronic mail transmission shall be deemed binding.
25

26 36. **Construction.** The language in all parts of this Consent Decree, unless
27 otherwise stated, shall be construed according to its plain and ordinary meaning. The
28 captions and paragraph headings used in this Consent Decree are for reference only

1 and shall not affect the construction of this Consent Decree.

2 **37. Authority to Sign.** The undersigned are authorized to execute this
3 Consent Decree on behalf of their respective parties and have read, understood and
4 agreed to all of the terms and conditions of this Consent Decree.
5

6 **38. Integrated Consent Decree.** All Consent Decrees, covenants,
7 representations and warranties, express or implied, oral or written, of the Parties
8 concerning the subject matter of this Consent Decree are contained herein.
9

10 **39. Severability.** In the event that any of the provisions of this Consent
11 Decree are held by a court to be unenforceable, the validity of the enforceable
12 provisions shall not be adversely affected.
13

14 **40. Choice of Law.** This Consent Decree shall be governed by the laws of
15 the United States, and where applicable, the laws of the State of California.
16

17 **41. Full Settlement.** This Consent Decree constitutes a full and final
18 settlement of this matter. It is expressly understood and agreed that the Consent
19 Decree has been freely and voluntarily entered into by the Parties with and upon
20 advice of counsel.
21

22 **42. Negotiated Consent Decree.** The Parties have negotiated this Consent
23 Decree, and agree that it shall not be construed against the party preparing it, but
24 shall be construed as if the Parties jointly prepared this Consent Decree, and any
25 uncertainty and ambiguity shall not be interpreted against any one party.
26

27 **43. Modification of the Consent Decree.** This Consent Decree, and any
28 provisions herein, may not be changed, waived, or discharged unless by a written
instrument signed by the Parties.
29

1 44. **Assignment.** Subject only to the express restrictions contained in this
2 Consent Decree, all of the rights, duties and obligations contained in this Consent
3 Decree shall inure to the benefit of and be binding upon the Parties, and their
4 successors and assigns.
5

6 45. **Mailing of Documents to Waterkeeper/Notices/Correspondence.**
7 Any notices or documents required or provided for by this Consent Decree or related
8 thereto that are to be provided to Waterkeeper pursuant to this Consent Decree shall
9 be, to the extent feasible, sent via electronic mail transmission to the e-mail addresses
10 listed below or, if electronic mail transmission is not feasible, via certified U.S. Mail
11 with return receipt, or by hand delivery to the following address:
12

13 Los Angeles Waterkeeper:

14
15 Melissa Kelly
16 Los Angeles Waterkeeper
17 120 Broadway, Suite 105
18 Santa Monica, CA 90401
19 E-mail: melissa@lawaterkeeper.org

20 With copies sent to:

21
22 Douglas Chermak
23 Lozeau Drury LLP
24 410 12th Street, Suite 250
25 Oakland, CA 94607
26 E-mail: doug@lozeaudrury.com

27 Unless requested otherwise by Burbank, any notices or documents required or
28 provided for by this Consent Decree or related thereto that are to be provided to

1 Burbank pursuant to this Consent Decree shall, to the extent feasible, be provided by
2 electronic mail transmission to the e-mail addresses listed below, or, if electronic mail
3 transmission is not feasible, by certified U.S. Mail with return receipt, or by hand
4 delivery to the addresses below:
5

6 Burbank:

7 Jorge Somoano, General Manager
8 Burbank Water and Power
9 P.O. Box 631
Burbank, CA 91503-0631
10 Email: JSomoano@burbankca.gov

11 Claudia Fierro, Environmental and Safety Manager
12 Burbank Water and Power
13 P.O. Box 631
Burbank, CA 91503-0631
14 Email: CFierro@burbankca.gov

15 With copies sent to:

17 Amelia Ann Albano, City Attorney
18 275 E. Olive Avenue
19 Burbank, CA 91502
Email: AAlbano@burbankca.gov

21 Chris Chwang, Senior Deputy City Attorney
22 275 E. Olive Avenue
23 Burbank, CA 91502
Email: CChwang@burbankca.gov

24 Ryan Waterman
25 Brownstein Hyatt Farber Schreck, LLP
26 225 Broadway, Suite 1670
San Diego, CA 92101
27 E-mail: rwaterman@bhfs.com

Notifications of communications shall be deemed submitted on the date that they are emailed, or three (3) business days after postmarked and sent by first-class mail, or one (1) business day after deposited with an overnight mail/delivery service. Any changes of address or addressees shall be communicated in the manner described above for giving notices.

46. If for any reason the DOJ or the Court should decline to approve this Consent Decree in the form presented, the Parties shall use their best efforts to work together to modify the Consent Decree within thirty (30) days so that it is acceptable to the DOJ or the Court. If the Parties are unable to modify this Consent Decree in a mutually acceptable manner that is also acceptable to the Court, this Consent Decree shall immediately be null and void as well as inadmissible as a settlement communication under Federal Rule of Evidence 408 and California Evidence Code section 1152.

47. The settling Parties hereto enter into this Consent Decree, Order and Final Judgment and submit it to the Court for its approval and entry as a final judgment.

[SIGNATURES ON FOLLOWING PAGE]

LOS ANGELES WATERKEEPER

Date: February 21, 2018

Bruce Reznik
Executive Director
Los Angeles Waterkeeper

CITY OF BURBANK

Date: 2/20, 2018

~~Jorge Somoano
General Manager~~

Approved as to form:

LOZEAU DRURY LLP

Date: 21 February, 2018

Douglas Chermak
Attorneys for Los Angeles Waterkeeper

LOS ANGELES WATERKEEPER

Date: 2/21, 2018

Melissa Kelly
Attorney for Los Angeles Waterkeeper

1 CITY OF BURBANK

2 Date: February 9, 2018

3
4 Christopher
5 Chwang for

Amelia Ann Albano
6 City Attorney for the City of Burbank

7 BROWNSTEIN HYATT FARBER SCHRECK, LLP

8 Date: February 8, 2018

9
10 Ryan Waterman
11 Attorney for City of Burbank

12
13 **IT IS SO ORDERED.**

14
15 Date: May 22, 2018

Rozella A. Oliver
16 Honorable Rozella A. Oliver
17 United States Magistrate Judge
18 Central District of California

EXHIBIT A

